Filed 6/15/12 Perris Valley Community Hospital v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PERRIS VALLEY COMMUNITY HOSPITAL,

Petitioner,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

JEANIE OLSON, Individually and as Executor, etc.,

Real Party in Interest.

E055154

(Super.Ct.No. RIC515885)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Paulette D. Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted in part; denied in part.

Marrone, Robinson, Frederick & Foster, J. Alan Frederick, Thomas A. Foster and Constance Smith for Petitioner.

No appearance for Respondent.

Robinson-Legal and Raymond G. Robinson for Real Party in Interest.

INTRODUCTION

In this case, petitioner and defendant Perris Valley Community Hospital (Hospital) moved for summary judgment and/or summary adjudication of issues on the basis that both causes of action of plaintiffs' complaint were barred by the statute of limitations, Code of Civil Procedure section 340.5.[1] The trial court denied the motion and Hospital seeks review.[2] We grant the petition in part and deny it in part.[3]

STATEMENT OF FACTS

The facts argued by the parties as significant or material are as follows: Olson is the daughter of decedent Glenn Negley (Negley). During the last stages of his life, Negley was treated for a period of some weeks at Hospital.[4] Olson evidently became

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[1] All further statutory references are to the Code of Civil Procedure.

[2] Hospital's motion also attempted to establish compliance with the professional standard of care, but this point is not at issue here. The petition also argues that plaintiff Jeanie Olson (Olson), individually, lacks standing. This issue was not directly presented by the motion below and insofar as the argument is other than a variation of the limitations defense, we do not consider it.

[3] We reject Olson's arguments that writ review is not necessary because Hospital has an adequate remedy by appeal after judgment. The Legislature has specifically provided for writ review of summary judgment/adjudication rulings (§ 437c, subd. (m)(1)) and, in our view, this suggests that reviewing courts should take serious looks at such petitions. Furthermore, where an erroneous denial will subject a party to a more expensive and arduous trial, pretrial review is appropriate, and the same is true where the trial court has made a clear error of law. (See *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 319-320.)

[4] The complaint names "Vista Hospital," which is a "dba" of Hospital.

concerned about his care and retained counsel to consider filing a malpractice lawsuit on December 13, 2007. Negley died on December 20, 2007.

The original complaint for damages was filed on December 22, 2008.[5] This pleading was entitled "Complaint for Negligence" and named *only* "Estate of Glenn Negley" as a plaintiff. The first sentence of the complaint begins "PLAINTIFF ESTATE OF GLENN NEGLEY, *by and through Jeanie Olson, the executor thereof* . . . hereby brings this complaint for negligence . . . ." (Italics added.) This complaint is "not a model of pleading,"[6] (see *State of California v. Superior Court* (2001) 87 Cal.App.4th 1409, 1411 [Fourth Dist., Div. Two]) describes "plaintiff's" (see fn. 7) hospitalization and treatment, including the assertion that "[p]laintiff is informed, believes, and thereon alleges that as a result of the improper and negligent treatment afforded to Plaintiff by Defendants, and each of them, Plaintiff's health rapidly and unnecessarily deteriorated to the point where his condition became incurable and death . . . occurred . . . ." It goes on to further allege breaches of duties owed to "plaintiff" and pain and suffering incurred by "plaintiff," and repeats that "plaintiff" "succumbed to his preventable and treatable

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[5] This was within one year of decedent's death, legally, because December 20, 2008, was a Saturday. Filing on Monday, December 22, was therefore timely. (§§ 12, 12a.)

[6] It uses the term "plaintiff" indiscriminately to refer both to Olson and decedent, as in the statements that "[p]laintiff is, and at all times mentioned herein was, a resident and domiciliary of the State of California, with *his* principal place of residence located in Hemet, California," (obviously Negley is not *currently* such a resident and Olson is not a "he") and "[p]laintiff has provided notice to each of the named defendant healthcare providers of the claims raised in this action, pursuant to *California Code of Civil Procedure* § 364." (Italics added.) (Obviously, Negley did not himself provide such notice, so this must reference Olson in her representative capacity.)

injuries." This pleading contains *no* allegations of damages that may have been incurred personally by Olson.[7]

Olson later obtained new counsel and on November 5, 2010, filed a first amended complaint. This complaint listed as plaintiffs "ESTATE OF GLENN NEGLEY, an estate, and JEANIE OLSON, an individual." Once again, this was not a model of pleading. It repeated the allegations of negligent care as to Negley, and the only specifically alleged damages were those suffered by Negley. However, it did allege that "plaintiffs," in the plural, had suffered some sort of damages and Olson alleged that as the sole surviving child of Negley, she was "entitled to prosecute this action on behalf of herself and the decedent."

We have three primary questions to answer: (1) Does the original complaint state a cause of action for wrongful death? (2) If it does not, does the amended complaint "relate back" or is it timely for other reasons? (3) If the original complaint was one for personal injuries, was it timely filed? Our answers are no, no, and yes.

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[7] Section 377.61 allows the recovery in a wrongful death action of damages "that, under all the circumstances of the case, may be just . . . ." These have been judicially defined to include pecuniary injury stemming from the loss of decedent's support, services, or advice, as well as the pecuniary value of the decedent's companionship and society. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264 (*Quiroz*).)

DISCUSSION

A.

The Original Complaint Does Not State a Cause of Action for Wrongful Death

In our view, this is a very simple question. It may be that the simplicity of the matter is due to the errors of original counsel,[8] but the original complaint neither identifies a wrongful death plaintiff nor alleges any recoverable wrongful death damages. Its focus is *solely* on the injuries suffered by Negley. Olson argues that the original complaint states a cause of action for wrongful death because it alleges that Negley died a "'premature'" death, but this is just a non sequitur. The fact that Negley died does not require that a wrongful death action be filed, and the mention of his death does not constitute a wrongful death claim. Olson also asserts, in phrases remarkably alike for snideness and irrelevance,[9] that "[p]etitioner seems unaware that a wrongful death action

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[8] Although obviously the point is not relevant to the legal issues involved in this case, Hospital included in its motion below a copy of a legal malpractice action filed by Olson against the firm that filed the original complaint on her behalf. Interestingly, this complaint does not criticize prior counsel for not filing a *wrongful death* action, but merely complains that they did not file the "malpractice" action within one year. As we have explained *ante*, the original complaint here *was* filed within one year as modified by statute. (See fn. 6.)

[9] The response also argues at great length, and to questionable intended effect, that the original complaint is "irrelevant." It includes claims that Olson never read this complaint. So? Even while asserting that the original is irrelevant, the response vigorously defends its clarity. The parties would all have been better advised to focus their arguments on meritorious issues of legal significance.

is but one of many forms of negligence.[10] After all, petitioner is not being sued for putting [decedent] against a wall and shooting him, it is being sued for [its] negligent conduct leading to death." The point ignored by Olson is that among the critical functions and purposes of a pleading are to frame and limit the issues, and to inform the defendant of the basis upon which Olson seeks recovery. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211-212; *Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415.) The original complaint does not list Olson individually as a plaintiff and in fact expressly describes her capacity as that of executor, alleging that the Estate sues "by and through" her. It does not set out any recoverable wrongful death damages. It does not even attempt to set out a wrongful death claim and certainly does not give the defendants notice that such a claim is being made.

Of course, we realize that when negligence or other wrongful conduct results in a death, the prospect of a suit for wrongful death may reasonably be contemplated. But the fact that a defendant may wonder why a wrongful death claim was not made is not a substitute for *making* such a claim. We also note that the original complaint does not

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10 A wrongful death action may also be premised on an *intentional* killing. Section 377.60 simply sets out who may sue for the "death of a person caused by the wrongful act or neglect of another . . . ."

even identify Olson as decedent's daughter—that is, it does not show that she has a personal claim for the wrongful death of Negley.[11]

The original complaint did not state any discernible claim for wrongful death. We proceed to the next question.

B.

1. *The Amended Complaint Does Not "Relate Back"*

The "relation back" doctrine provides in general that an amended complaint will "relate back" to the date the original complaint was filed in order to avoid the possible bar of the statute of limitations *if* it is based on the same set of facts. (See *Davaloo v. State Farm. Ins. Co.*, *supra*, 135 Cal.App.4th at pp. 415-416.)

In this case, of course, the same general facts are involved, but the rule also has another element: the new claim must be asserted by the *same plaintiff*. (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1550; *Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526, 533-534 (*Bartalo*).) In *Bartalo*, a husband attempted to join his wife's action for personal injuries by asserting his own claim for loss of consortium, but the appellate court held that his claim did not "relate back" because the

[11] Section 377.60 permits (but does not require) a cause of action for wrongful death to be brought by the decedent's personal representative on behalf of the heirs or other persons holding the cause of action. However, where a complaint for personal injury does not identify the personal representative as an heir, it may reasonably be assumed that the heirs intend to sue separately for their damages.

elements of loss were personal to him and were distinct from his wife's claims. (*Bartalo*, at p. 533.)[12]

In *San Diego Gas & Electric Co.*, a wrongful death action was filed by several surviving heirs of four Marines killed in an accident. Among the plaintiffs were the parents of decedent Adam Miller. Later, after the statute of limitations had run, Adam Miller's surviving wife sought to be added as an additional plaintiff/heir. Held, because each heir had to establish independent damages and enforce an independent right, any amendment adding the wife as plaintiff would not relate back. (*San Diego Gas & Electric Co. v. Superior Court*, *supra*, 146 Cal.App.4th at pp. 1548, 1550, 1552-1553.)

And, in a case that is the reverse of this one, *Quiroz*, *supra*, 140 Cal.App.4th 1256, the original complaint was one for the wrongful death of Gilbert Quiroz.[13] (*Quiroz*, at p. 1262.) The amended complaint—filed after the statute of limitations ran—named one

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[12] We specifically asked Olson to discuss the possible applicability of *Bartalo*. She comments that "[u]nsurprisingly, the court found that injuries in a car accident, the wife's claims, were different from loss of sexual services." She goes on to assert that *Bartalo* does not apply because "[h]ere the injury, as pled, is the same." This is only true to the extent that the amended complaint *also* fails to adequately allege any damages to Olson *personally*. To the extent that Olson wants to make a claim for her personal damages due to decedent's death, it is *not* true and reflects a lack of understanding of the cases cited.

[13] The decedent in *Quiroz* had allegedly been the victim of professional negligence and/or elder abuse while residing at a skilled nursing facility. The original complaint was clearly a confused mishmash but it must be noted that the Quiroz plaintiffs prepared it in propria persona. (See *Quiroz*, *supra*, 140 Cal.App.4th at pp. 1262, 1266.) Because the plaintiffs alleged only their own injuries, the appellate court refused to consider it as stating any survivor cause of action on behalf of decedent. (*Id*. at pp. 1266-1267, fn. 7.)

of the two original plaintiffs,[14] but alleged a cause of action brought by that remaining plaintiff on *behalf* of decedent, as his heir and representative. (*Id*. at pp. 1267, 1277.) As the court commented, the allegations of this new claim "clearly distinguished the negligence claim as a pure survivor action brought on behalf of [decedent], in which [plaintiff's] capacity was representative only, from the wrongful death cause of action, in which [plaintiff] sought recovery on her own behalf and for her own injuries." (*Id*. at p. 1269.) Relying on inter alia the decision in *Bartalo*, the *Quiroz* court held that the survivor action did not relate back. (*Quiroz*, at p. 1262.)

This case is indistinguishable from *Quiroz*. Insofar as she attempts to state a claim for the wrongful death of Negley, Olson's amended complaint sets out a completely new cause of action and seeks to recover for her own injuries rather than those suffered by decedent. To this extent, she is a "new" party to the case. Her claim is distinct and does not relate back.

We now tackle the next part of this question.

B.

2. *The Wrongful Death Claim is Not Timely Under Any Theory*

Although section 335.1 establishes a general two-year statute of limitations for wrongful death actions, this case is governed by section 340.5, which applies to all actions "for injury or death against a health care provider based upon such person's

[14] The other plaintiff's standing to sue as an heir had been challenged, and the merits of the challenge were apparently accepted. (*Quiroz*, *supra*, 140 Cal.App.4th at p. 1267.)

alleged professional negligence." The limitations period is "three years after the date of injury or one year after the plaintiff discovers, or . . . should have discovered, the injury, whichever occurs first." (*Ibid*.) There are limited tolling provisions, one of which is based upon "proof of fraud." (*Ibid*.)

Olson, in her individual/personal capacity, proffers several reasons why her claim for wrongful death damages should be considered timely distinct from the failed "relation-back" theory. None has merit.

We have already dismissed the argument that the original complaint *does* set out a claim for wrongful death. Olson then argues that because she alleges that Hospital promised excellent results, the tolling provision noted above comes into play. There are numerous problems with this argument.

First, the amended complaint does not allege that Hospital promised excellent care. Olson directs our attention only to a statement in an expert declaration filed in opposition to the motion for summary judgment, which indicates that Olson *asserts* that such a promise or representation was made. It is axiomatic, to say the least, that it is the *pleadings* that frame the argument when a motion for summary judgment is made (*Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1225), and it is equally axiomatic that the elements of fraud must be specifically pleaded. (*Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1557.) Furthermore, there are no damages alleged from any supposed fraud, and this is not a separate claim governed by the three-year statute of section 338.

More substantively, Olson's attempt to rely on any fraudulent misrepresentations to toll the one-year period of section 340.5 is belied by the facts. She consulted with legal counsel before decedent's death, and the only rational inference is that she was dissatisfied with the care rendered and believed that it was substandard.[15] The one-year statute of limitations in section 340.5 begins to run when a plaintiff suspects, or should suspect, that the injury was caused by wrongdoing. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110; *Garabet v. Superior Court* (2007) 151 Cal.App.4th 1538, 1545.) It is indisputable that Olson suspected malpractice in December 2007 when she retained counsel. Beyond that, it is even *more* indisputable[16] that she was aware of the malpractice by December 22, 2008, when she filed her original complaint, and the one-year statute began to run at that time at the very latest. She nevertheless delayed almost two more years before attempting to assert a personal claim for her own damages.

Any (unpleaded) reliance by Olson on any (unpleaded) misrepresentations obviously ended before decedent passed away. As she did not file her amended complaint until November 2010, the wrongful death claim was not timely.

We now turn to Hospital's arguments relating to the personal injury/survivor cause of action.

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[15] Offering a rather biblical tone, one heading in the opposition reads "He Was Not Dead." Olson argues that she could not have consulted an attorney about a wrongful death claim that had not yet accrued. Of course, this is true, but the evidence concerning her obvious suspicions applies to any claim based on decedent's treatment that she might personally make. If she was suspicious a week before Negley passed away, she must have been suspicious on the date of his death, thus triggering the statute of limitations.

[16] We are aware that this is a logical impossibility.

C.

The Survivor Cause of Action was Timely Filed

Hospital incorrectly relies on the concerns clearly felt by Olson, at least insofar as Hospital attempts to start the statute of limitations running before Negley passed away. Certainly up until that time, the cause of action was personal to Negley and it is *his* awareness and/or suspicions that are relevant—points on which there is no evidence whatsoever.[17] (See *Tzolov v. International Jet Leasing, Inc.* (1991) 232 Cal.App.3d 117, 120.) Petitioner's reliance on Olson's status as executor is misplaced at least until she *was* the executor. Certainly prior to Negley's death on December 20, 2007, Olson could have had no authority to act on his behalf and her concerns could not bind him.

There is authority that suggests that once Negley passed away, Olson's suspicions were sufficient to trigger the one-year statute of limitations as to a claim she would eventually make, as the court concluded in *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 414. As we have noted, the complaint was timely filed at least as to any recoverable damages suffered by Negley at the end of his life. We do note that *Carter* does not consider the effect of section 366.1, which provides that "[i]f a person entitled to bring an action dies before the expiration of the applicable limitations

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[17] It appears from the evidence that Negley might have been legally incompetent at the time of his treatment; however, the tolling provisions of section 352 applicable to incompetents do *not* apply in medical malpractice cases. (See *Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 321 (conc. opn. of Poché, J.) [when §§ 340.5, 340.6, governing legal malpractice and that *is* tolled for incompetents are compared, the result is that if your doctor turns you into an incompetent, you still must sue within three years, but if your lawyer then fails to file suit for you, "take your time in suing him"].)

period, and the cause of action survives, an action may be commenced before the expiration of the later of the following times: [¶] (a) Six months after the person's death. [¶] (b) The limitations period that would have been applicable if the person had not died." It would seem that if the deceased person (speaking in general terms) would have been entitled to three years in which to sue at the time of his or her death (because the shorter period had not been triggered), his successors, bringing the action on his behalf, would be entitled to the same period.[18] However, because there could be some recoverable damages even if the one-year period applies, we need not decide the issue.

In summary, the original complaint cannot be construed as stating a wrongful death claim, and Olson's attempt to add such a claim is therefore time-barred. However, the trial court correctly denied Hospital's motion for summary judgment/adjudication on the survivor action.

DISPOSITION

The petition for writ of mandate is granted in part and denied in part. Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order denying summary adjudication on any claim for wrongful death, and to enter a new order granting petitioner's motion in that respect. In all other respects, the petition is denied.

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[18] In most cases, involving, e.g., a specific act of malpractice (or a traffic date), the damages will be incurred forward so that as long as the action is timely filed, all damages will be recoverable. In a case like this one, involving a considerable period of alleged negligent or wrongful conduct and injury, application of the statute of limitations may operate to bar the recovery of early damages.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

In the interests of justice, the parties shall each bear their own costs. The previously ordered stay is lifted.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

KING
J.